



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL NO. 199 OF 2009

DANIEL WAMBUA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

Being an appeal from the original conviction and sentence in Machakos Chief Magistrates Court
Criminal Case No. 18 of 2008 by Hon. F.N. Muchemi, CM on 10/3/09)

JUDGMENT

1. **Daniel Wambua**, the appellant was charged with the offence of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. Particulars thereto being that on the **18th** day of October, 2008 at [Particulars Withheld] in Machakos District within Eastern Province indecently and unlawfully assaulted L M by touching her private parts.
2. He was tried, convicted and sentenced to ten (10) years imprisonment. Being aggrieved by the conviction and sentence in the amended grounds of appeal, he stated thus:-
 - i. vital witnesses did not testify.
 - ii. Acting on uncorroborated evidence was erroneous on the part of the trial court.
 - iii. the charge sheet was defective
 - iv. The alibi defence was rejected on flimsy grounds.
3. According to the prosecution the appellant and the complainant were neighbours who resided on the same plot. On the 18th October, 2008 at 1.00pm the complainant was at home cooking when the appellant went to their house to borrow toothpaste. He helped himself to the toothpaste that was on the table and left.
4. Later the appellant returned and grabbed her. He told her that he loved her. He pushed her onto the sofa set and pulled off her underpants. He unzipped his pair of trousers and tried to push her legs apart. He attempted to penetrate her. She struggled and fell off the seat. He escaped. She reported the incident to her neighbor. Thereafter her father came home and she narrated what happened. They reported the matter to the police. The appellant was arrested and charged.
5. In his defence the appellant stated that he was on duty until 7.00pm and denied having gone to the complainant's house. He stated that his wife had done some work for the family of the complainant who failed to pay him. When he demanded for payment they framed him up.
6. The learned trial magistrate evaluated evidence adduced. She considered the demeanor of the complainant whom she found credible. She considered the defence put up by the appellant and disregarded it.

7. At the hearing of the appeal the appellant opted to canvass his appeal by way of written submissions. He buttressed grounds of appeal relied upon.
8. In a response thereto the state opposed the appeal. Mrs. Muva, learned State Counsel submitted orally that identification of the appellant was positive which made it a case of recognition. She argued that the complainant who was an intelligent girl adduced evidence which established the fact that the appellant committed the offence.
9. This being a first appeal, my duty is to reconsider the evidence adduced in the lower court, re-evaluate it and come to my own conclusions bearing in mind that I neither saw nor heard witnesses who testified. (*See Okeno versus Republic [1972] E.A. 32*).
10. The appellant was accused of contravening section 11(1) of the Sexual Offences Act which states :-

“Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both”.

11. An indecent Act is defined as :-

“An unlawful intentional act which causes:-

- a. ***any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration”.***
12. The complainant was alone inside the house when the appellant grabbed her. It was her evidence that the appellant forced her to lie on the sofa, removed her underpants. He lay on her, used one hand to unzip his pair of trousers. He pushed her legs apart as she lay on her. He removed his penis which touched her thighs before he released her.
13. According to the proviso to Section 124 of the Evidence act, the court does not require evidence to corroborate that of a sexual victim in order to convict an accused person. What it requires is to satisfy itself that the complainant is truthful and was telling the truth (Also see JWA versus Republic, Nairobi Criminal Appeal No. 100 of 2013).
14. In convicting the appellant the trial court remarked:-

“the complainant described how accused grabbed her, sexually assaulted her , he knocked her down on the sofa set and lay on her unzipping his trouser. He pulled off her underwear. It is due to the great resistance that the complainant made against the accused that saved her from being defiled. It is my finding that the evidence adduced proves that the accused did an indecent act on the complainant who was under 14 years”.

15. Looking at the particulars of the offence it is stated that the accused:-

“Indecently and unlawfully assaulted Lisper Murugi by touching her private parts namely vagina”.

16. Sexual assault is provided for by Section 5 of the Sexual Offences Act that state as follows:-

- 5) ***Any person who unlawfully -***
 - a. ***penetrates the genital organs of another person***

with -

 - (i) ***any part of the body of another or that person; or***
 - (ii) ***an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical***

purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body."

17.No evidence of penetration was adduced. Regarding paragraph (b) of the Section, had there been manipulation of any part of the body so as to cause penetration of the genital organ of the accused into any part of the complainant's body, nothing would have been easier than to expressly state so in the particulars of the offence.

18.The particulars of the offence as stated in the charge do not support the statement of the offence stipulated.

19.In the premises evidence adduced did not prove the charge. Consequently, the appeal succeeds. I quash the conviction and set aside the sentence meted out.

20.The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 6TH day of NOVEMBER, 2014.

L.N. MUTENDE

JUDGE